



Signed: February 20, 2008

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

BALLY TOTAL FITNESS
CORPORATION,

A.P. No. 07-4190 AT

Plaintiff,

vs.

CONTRA COSTA RETAIL CENTER,
et al.,

Defendants.

CONTRA COSTA RETAIL CENTER,
LLC, et al.,

A.P. No. 07-4191 AT

Plaintiffs,

vs.

BALLY TOTAL FITNESS
CORPORATION,

Defendant.

MEMORANDUM OF DECISION

Plaintiff Contra Costa Retail Center, LLC ("Landlord") moves to remand the above-captioned adversary proceeding against Bally Total Fitness Corporation ("Bally") to the Superior Court of Contra Costa

1 County, State of California (the "State Court"). For the reasons
2 stated below, the motion will be granted.

3 BACKGROUND

4 Bally filed a chapter 11 petition in the United States
5 Bankruptcy Court for the Southern District of New York on July 31,
6 2007 (the "Bankruptcy Case"). An order confirming Bally's
7 reorganization plan (the "Plan") was entered on September 17, 2007
8 (the "Confirmation Order").

9 Prior to the bankruptcy filing, Bally operated a fitness
10 facility located on real property in Contra Costa County (the "Real
11 Property") pursuant to a written lease (the "Lease") with Landlord,
12 the owner of the Real Property. In or about May 2007, Landlord
13 asserted that Bally was in default of the Lease and gave Bally a
14 twenty day notice to quit the Real Property. In June 2007, Landlord
15 gave Bally a three day notice to quit.

16 Bally contended that it was not in default of the Lease and
17 refused to vacate the Real Property. Instead, it filed a complaint
18 in State Court against Landlord, seeking a temporary restraining
19 order and preliminary and permanent injunctions as well as damages
20 for breach of contract (the "Injunction Action"). The applications
21 for a temporary restraining order and a preliminary injunction were
22 both denied.

23 In the meantime, Landlord had filed an unlawful detainer action
24 in State Court (the "Unlawful Detainer Action"). The State Court
25 ordered the Injunction Action and the Unlawful Detainer Action to be
26 coordinated through a single department of the Superior Court. Bally

1 filed a demurrer to the complaint in the Unlawful Detainer Action
2 (the "UD Complaint"). After Landlord had filed an opposition to the
3 demurrer and before the demurrer could be heard, Bally filed for
4 chapter 11, thereby staying prosecution of the Unlawful Detainer
5 Action.

6 Bally filed a pre-packaged chapter 11 plan (the "Plan") with the
7 bankruptcy petition or shortly thereafter. The Plan provided that
8 the Lease would be assumed pursuant to 11 U.S.C. § 365. Landlord
9 objected to the Plan and accompanying disclosure statement,
10 contending that the Lease could not be assumed because it had been
11 terminated before the bankruptcy petition was filed. Bally disputed
12 this contention. To permit a prompt confirmation of the Plan without
13 waiting for this dispute to be resolved, the parties agreed that
14 confirmation of the Plan would have no effect on the issues being
15 litigated in State Court.

16 The effective date of the Plan was October 2, 2007, at which
17 time the automatic stay expired. Thus, at this point, further
18 prosecution of the Unlawful Detainer Action was no longer barred. On
19 November 26, 2007, the State Court issued an order denying Bally's
20 demurrer to the UD Complaint. Shortly thereafter, Landlord scheduled
21 a deposition of Bally's most knowledgeable person with respect to the
22 Lease and related issues. In response, on or about November 26,
23 2007, Bally filed and served a notice of removal of the Injunction
24 and Unlawful Detainer Actions (the "State Court Actions") to the
25 United States Bankruptcy Court for the Northern District of
26 California.

1 On or about December 20, 2007, Landlord filed a motion to remand
2 the State Court Actions to the State Court and/or to abstain. Bally
3 opposed the motion. A hearing on the motion was conducted on January
4 17, 2008 at which time the motion was taken under submission.
5

6 7 DISCUSSION

8 A. APPLICABLE LAW

9 1. Removal and Remand

10 Section 1452(a) of Title 28 of the United States Code provides
11 as follows:

12 A party may remove any claim or cause of action
13 in a civil action other than a proceeding before
14 the United States Tax Court or a civil action by
15 a governmental unit to enforce such governmental
16 unit's police or regulatory power, to the
17 district court for the district where such civil
18 action is pending, if such district court has
19 jurisdiction of such claim or cause of action
20 under section 1334 of this title.

21 28 U.S.C. § 1452(a). Section 1334(b) provides, in pertinent part,
22 the district court "shall have original but not exclusive
23 jurisdiction of all civil proceedings...related to cases under title
24 11." 28 U.S.C. § 1334(b).¹ Section 1452(b) provides in pertinent
25 part that "[t]he court to which such claim or cause of action is
26

23 ¹Section 157(a) provides that a district court may provide
24 that this jurisdiction is referred to the bankruptcy court. 28
25 U.S.C. § 157(a). The United States District Court for the Northern
26 District of California has provided that its bankruptcy
jurisdiction is referred to the United States Bankruptcy Court for
the Northern District of California. See Local Rules for the
United States Bankruptcy Court for the Northern District of
California, B.L.R. 5011-1(a).

1 removed may remand such claim or cause of action on any equitable
2 ground." 28 U.S.C. § 1452(b).

3 Rule 9027(a)(2) of the Federal Rules of Bankruptcy Procedure
4 provides that, if a claim or cause of action is pending when a
5 bankruptcy petition is filed, the deadline for filing a notice of
6 removal is the later of: (1) 90 days after the order for relief, (2)
7 30 days after the entry of an order terminating the automatic stay if
8 prosecution of the proceeding was stayed pursuant to 11 U.S.C. § 362,
9 or (3) 30 days after a trustee qualifies in a chapter 11 case but not
10 later than 180 days after the order for relief. Fed.R.Bankr.Proc.
11 9027(a)(2).

12 **2. Abstention**

13 Section 1334(c)(2) provides that:

14 Upon timely motion of a party in a proceeding
15 based upon a State law claim or State law cause
16 of action, related to a case under title 11 but
17 not arising under title 11 or arising in a case
18 under title 11, with respect to which an action
19 could not have been commenced in a court of the
20 United States absent jurisdiction under this
21 section, the district court shall abstain from
22 hearing such proceeding if an action is
23 commenced, and can be timely adjudicated, in a
24 State forum of appropriate jurisdiction.

25 28 U.S.C. § 1334(c)(2). This is sometimes referred to as mandatory
26 abstention. Section 1334(c)(1) provides that:

27 Except with respect to a case under chapter 15
28 of title 11, nothing in this section prevents a
29 district court in the interest of justice, or in
30 the interest of comity with the State courts or
31 respect for State law, from abstaining from
32 hearing a particular proceeding arising under
33 title 11 or arising in or related to a case
34 under title 11.

1 28 U.S.C. § 1334(c)(1). This is sometimes referred to as
2 discretionary abstention.

3 **B. DECISION**

4 Landlord contends that the State Court Actions should be
5 remanded based on principles of mandatory and discretionary
6 abstention. See 28 U.S.C. § 1334(c)(1)&(2). Strictly speaking,
7 these statutes do not apply to remand of a removed proceeding.
8 Remand is based on general equitable principles. See 28 U.S.C. §
9 1452. However, arguably, failure to remand where all of the elements
10 of mandatory abstention are present would be an abuse of the Court's
11 discretion. As a result, the Court will address each of these two
12 grounds.

13 **1. Mandatory Abstention as Ground for Remand**

14 There are five elements required for mandatory abstention to
15 apply. They are that: (a) the motion must be made on a timely basis,
16 (b) the claim must be based on state law, (c) the claim cannot be
17 either based on bankruptcy law or have arisen in a bankruptcy case,
18 (d) the claim must not have been capable of being filed in a federal
19 court absent bankruptcy jurisdiction, and (e) the claim must be
20 capable of being timely adjudicated in state court. See 28 U.S.C. §
21 1334(c)(2). Landlord contends that each of these elements is present
22 here. Bally disagrees.

23 **a. Timeliness of Motion**

24 As recited above, Bally removed the State Court Actions to the
25 bankruptcy court on or about November 26, 2007. The motion to remand
26 or abstain was filed on December 20, 2007, less than a month later.

1 Bally does not appear to contend that the motion was untimely. The
2 Court concludes that it was timely.

3 **b. Claim or Cause of Action Based on State Law**

4 Clearly, the claims asserted in the State Court Actions are all
5 based on state law. Bally does not appear to contend otherwise.
6

7 **c. Claim or Cause of Action Does Not Arise Under Title 11 and**
8 **Did Not Arise in a Case Under Title 11**

9 The State Court Actions do not assert any claim or cause of
10 action under Title 11: i.e., the Bankruptcy Code. Since the State
11 Court Actions were filed prior to the commencement of Bally's
12 bankruptcy case, clearly the claims or causes did not arise in a case
13 under Title 11: i.e., Bally's case.

14 **d. No Other Basis for Federal Court Jurisdiction**

15 In its motion, Landlord notes that the claims asserted in the
16 State Court Actions are based solely on California law. It then
17 contends that there is no independent basis for federal jurisdiction
18 for the State Court Actions. In its opposition, Bally takes issue
19 with the second assertion. It contends that Landlord and "all
20 related parties" are California entities whereas Bally is a Delaware
21 corporation. Therefore, the State Court Actions could have been
22 filed in federal court based on diversity jurisdiction. Bally
23 asserts that the State Court Actions also meet the minimum dollar
24 amount required by diversity jurisdiction based on the value of the
25 Lease. See 28 U.S.C. § 1332(a).
26

1 In its reply, Landlord does not dispute that citizenship of the
2 parties is diverse. However, it contends that, as the plaintiff,
3 Bally could not have removed the Injunction Action to federal court
4 based on diversity jurisdiction under the general federal removal
5 statute. Under 28 U.S.C. § 1441, the general federal removal
6 statute, the party that filed the action in state court cannot
7 thereafter remove it to federal court. This comment, while true,
8 disregards the precise language of 28 U.S.C. § 1334(c)(2). The
9 necessary element for mandatory abstention is that the action could
10 not have been *commenced* in a court of the United States, not whether
11 it could have been removed there absent jurisdiction under 28 U.S.C.
12 § 1334.

13 Landlord also disputes Bally's contention that the Unlawful
14 Detainer Action satisfies the minimum dollar amount for diversity
15 jurisdiction. At present, the minimum dollar amount for actions
16 prosecuted in federal court based on diversity jurisdiction is
17 \$75,000. 28 U.S.C. § 1332(a). Landlord notes that, under California
18 law, the damages sought in an unlawful detainer action are limited to
19 those directly related to the unlawful detention of the real property
20 in question. See Vasey v. California Dance Co., 70 Cal. App. 3d 742,
21 748 (1977). Landlord presumably contends that these are minimal.

22 Landlord's argument reads the minimum dollar amount requirement
23 for jurisdiction too narrowly. For purposes of diversity
24 jurisdiction, the measure of the dollar amount in controversy is not
25 limited to the amount of recoverable damages. When the action seeks
26 recovery of a leasehold, the value of the leasehold must be taken

1 into account. Several courts have found the appropriate dollar
2 amount in such actions to be at least one year's rent. See Mutual
3 First, Inc. v. O'Charleys of Gulfport, Inc., 721 F. Supp. 281, 283
4 (S.D. Ala. 1989). See also Swords to Plowshares v. Kemp, 423 F.
5 Supp. 2d 1031, 1037, fn.6 (N.D. Cal. 2005)(denying remand of unlawful
6 detainer action removed based on federal question jurisdiction and
7 citing Mutual First with approval).

8 The Lease called for payments of \$25,687 per month. Thus, one
9 year's rent was well in excess of the minimum dollar amount.

10 **e. Timely Adjudication**

11 Landlord contends that the State Court Actions could be timely
12 adjudicated in state court. It argues that the State Court Actions
13 were proceeding quickly until Bally filed for bankruptcy and, after
14 confirmation, removed them to bankruptcy court. Moreover, Landlord
15 notes that, under state law, an unlawful detainer complaint enjoys
16 statutory preference for trial setting purposes. See Cal. Civ. Proc.
17 Code § 1170.5(a). Bally does not address this element and therefore
18 presumably concedes it. In any event, the issue of timely
19 adjudication is less significant when a reorganization plan has
20 already been confirmed.

21 In sum, although most of the elements for mandatory abstention
22 are present. However, one of those elements is missing--i.e., the
23 absence of an independent basis for federal jurisdiction. Since all
24 elements must be present for mandatory abstention to apply, the Court
25 will not order a remand on this ground.
26

1 **2. Discretionary Abstention as Grounds for Remand**

2 As Landlord notes, a seven factor test has been established for
3 determining whether a claim should be remanded to state court as a
4 discretionary matter. See Williams v. Shell Oil, 196 B.R. 684, 690-
5 93 (S.D. Cal. 1994). Those factors are: (a) the effect of the action
6 on the administration of the bankruptcy estate; (b) the extent to
7 which issues of state law predominate; (c) the difficulty of
8 applicable state law; (e) comity; (f) the relatedness or remoteness
9 of the action to the bankruptcy case; (g) the existence of a right to
10 a jury trial; and (h) prejudice to the party involuntarily removed
11 from state court. Id. The Court will discuss each of these factors
12 as they appear in the factual context of this proceeding.

13 **a. Effect on Administration of Bankruptcy Estate**

14 Bally contends that remand will have a negative effect on the
15 administration of its bankruptcy case. It asserts that the facility
16 operated on the Real Property is one of its most profitable
17 operations and that disruption of its operations at this location
18 would be detrimental to Bally's economic prospects. It argues that
19 an efficient resolution of the Lease dispute is essential to the
20 success of its bankruptcy case.²

21
22
23 ²Clearly, the efficiency sought by Bally is not simply a
24 denial of the motion for remand but the granting of a motion (yet
25 to be filed) to transfer the State Court Actions to the bankruptcy
26 court in New York. In this context, Bally refers to the State Court
Actions as "core." They are clearly not "core" proceedings
because, as discussed above, they are neither based on bankruptcy
law nor did they arise in a bankruptcy case. See 28 U.S.C. §
157(b) (2).

1 Since the Plan has already been confirmed, Bally's argument is
2 particularly unpersuasive. While the potential loss of a profitable
3 location may well have a negative economic effect on Bally's
4 business, there is no evidence that it will impact the administration
5 of Bally's bankruptcy estate. To the contrary, after confirmation,
6 strictly speaking, there is no further bankruptcy estate. Moreover,
7 the outcome of the litigation will presumably not be affected by the
8 forum in which the litigation is conducted. Thus, this factor favors
9 remand.

10 **b. Extent To Which Issues of State Law Predominate**

11 As discussed in the preceding section and above, the only issues
12 presented in the State Court Actions are issues of state law. Thus,
13 this factor also favors remand.

14 **c. Difficulty of Applicable State Law**

15 Bally argues that there are no difficult issues of state law.
16 Landlord does not take issue with this contention. Thus, this factor
17 is neutral. It does not support remand. However, likewise, it does
18 not support retention of the proceeding.

19 **d. Comity**

20 General principles of comity support permitting issues of state
21 law to be determined by the state court absent other factors
22 dictating otherwise. Thus, if the other factors discussed in this
23 section created an equal equitable balance between retention and
24 remand, principles of comity dictate remand.

1 **e. Relatedness or Remoteness of Action to Bankruptcy Case**

2 Landlord contends that the issues presented by the State Court
3 Actions are remote to the bankruptcy case. Bally disagrees. It
4 contends that the State Court Actions are directly related to the
5 bankruptcy case. It notes that the Plan provided for assumption of
6 320 leases by Bally and its affiliates, among which was the Lease.
7 For this reason, Bally contends that the bankruptcy court in New York
8 is the appropriate court to adjudicate this dispute.

9 The Court agrees with Landlord. The fact that the Plan could be
10 confirmed without resolving the dispute makes it clear that the issue
11 presented by this dispute is not closely related to Bally's
12 bankruptcy case.

13 **f. Right to a Jury Trial**

14 Landlord notes that the California Constitution gives it a right
15 to a jury trial in the Unlawful Detainer Action. See Cal. Const.
16 Art. I, § 16.³ In its opposition, Bally does not dispute this
17 assertion. However, Bally cites authority for the proposition that
18 the right to a jury trial does not necessarily require remand,
19 particularly since the proceeding may never go to trial.
20 Nevertheless, the Court views this as a factor in favor of remand.
21 The bankruptcy court could not itself conduct the jury trial unless
22 the parties consented to the proceeding being treated as if it were
23 "core" and to the bankruptcy court conducting the jury trial. See
24 Fed. R. Bankr. Proc. 9015(b). This is unlikely to occur.

25
26 ³Landlord does not address its right to a jury trial in the
Injunction Action.

1 **g. Prejudice of Retention to Party Seeking Remand**

2 Landlord asserts that it will suffer prejudice if the State
3 Court Actions are not remanded. Bally has admitted that, if
4 Landlord's motion to remand is denied, it will seek to transfer the
5 proceeding to the bankruptcy court for the Southern District of New
6 York. Landlord argues that it would be unfair and prejudicial to
7 force it to litigate the State Court Action in New York. It points
8 out that the issue is one of California law concerning a transaction
9 that took place entirely in California. Moreover, it notes that the
10 Lease expressly provides that any litigation between the parties
11 concerning the Lease must be initiated in Contra Costa County.

12 In response, Bally contends that the prejudice asserted is not
13 supported by the record. To the contrary, Bally contends, because it
14 has leased facilities all over the United States, it will suffer
15 prejudice if not permitted to consolidate all of its litigation in
16 the bankruptcy court in New York. Landlord responds that Bally did
17 not initially consider the state court forum prejudicial since it
18 filed the Injunction Action there. Landlord asserts that Bally is
19 simply forum shopping, after receiving an unfavorable ruling on its
20 demurrer.

21 The Court concludes that this factor favors Landlord. The
22 factor in question does not address prejudice to Bally. It asks only
23 about the prejudice caused by the retaining the proceeding to the
24 party seeking remand. Clearly, there would be prejudice to Landlord
25 if Landlord were forced to travel to New York to prosecute this
26 litigation. Given the forum selection clause and the fact that the

1 dispute is governed solely by California law, the prejudice to
2 Landlord would be extremely unfair.

3 In sum, all of the factors to be considered in the context of
4 discretionary abstention either favor remand or at best are neutral
5 to it. Consequently, the Court concludes that the proceeding should
6 be remanded to State Court on a discretionary basis.

7 **CONCLUSION**

8 The factors governing mandatory abstention do not require
9 remand. There is an independent basis for federal jurisdiction other
10 than bankruptcy jurisdiction: i.e., diversity jurisdiction.
11 However, the factors governing discretionary abstention clearly favor
12 remand. Accordingly, Landlord's motion for remand will be granted.
13 Counsel for Landlord is directed to submit a proposed form of order
14 in accordance with this proceeding.

15 **END OF DOCUMENT**

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